IN THE CLAIMS:

Please cancel claim 2 without prejudice, add new claims 55 and 56 and amend claims 1 and 3-36 as follows:

1. (Currently Amended) A table comprising:

a support structure comprising a first wire support and a second wire support, each of said first and second wire supports comprising opposite ends joined to define a first and second foot and wherein a portion of said first and second wire supports form a first and second support platform respectively, wherein said first wire support comprises a first segment extending upwardly from said first foot to said first support platform and a second segment extending from said first support platform to said second foot, and wherein said second wire support comprises a first segment extending upwardly from said second foot to said second support platform and a second segment extending from said second support platform to said first foot;

a third wire support comprising opposite ends joined to said first and second feet, wherein a portion of said third wire support forms a third support platform, said third wire support comprising a first segment extending from said first foot to said third support platform and a second segment extending from said second foot to said third support platform; and

a work surface supported on said first, and second and third support platforms.

default is granted, and Plaintiff's Motion for default judgment is defied. Defendant's Motion for summary judgment is also granted and Plaintiff's Complaint is therefore dismissed.

I. BACKGROUND

On January 8, 2004, Plaintiff was convicted and sentenced in the United States District Court for the Northern District of New York to a fifteen month term of imprisonment with a

three year term of supervised release.¹ See Compl. ¶ 7; Def.'s Mem. at 1 (Dkt. No. 12, Attach. 3). On or about December 29, 2004, while Plaintiff was serving her fifteen month sentence at the Federal Correctional Institution in Danbury, Connecticut, the BOP transferred Plaintiff to the Horizon House, Community Corrections Center ("CCC")² in Albany, New York, to serve the remainder of her sentence. Compl. ¶ 9. On March 29, 2005, Plaintiff was released due to good conduct. Compl. ¶ 12; Dkt. No. 13, Ex. 1a. On June 8, 2005, the Court modified the conditions of Plaintiff's supervised release and ordered that she be placed at the CCC for ninety days. Compl. ¶ 13 and Ex. 2. Plaintiff was released from the CCC on September 7, 2005. Dkt. 13, Ex. 1a.

On June 29, 2007, Plaintiff filed an administrative tort claim with the BOP. Compl. ¶ 19 and Ex. 5. Plaintiff sought "[a]ll of the medical and other expenses [] incurred while in the custody of the Bureau of Prisons" Compl. Ex. 5. The BOP rejected her claim on July 23, 2007. Id. ¶ 20 and Ex. 6. On September 17, 2007 and November 30, 2007, Plaintiff sent additional letters to the director of the CCC, further outlining her claims. Compl. ¶ 21-22 and Ex. 7-8. On January 31, 2008, Plaintiff filed three independent tort claims with the BOP. Compl. ¶ 23 and Ex. 9-11. The BOP sent Plaintiff a letter on February 12, 2008, again rejecting her claims. Compl. ¶ 24 and Ex. 12. On March 7, 2008, Plaintiff sent a letter to the BOP requesting reconsideration of her claims. Compl. ¶ 25 and Ex. 13. The BOP denied her motion for reconsideration on April 3, 2008. Compl. ¶ 26 and Ex. 14.

¹ While Plaintiff alleges in her Complaint that she was sentenced to only one year of supervised release, the Judgment in her criminal case confirms that she was sentenced to three years supervised release. 1:01-cr-351, Dkt. No. 69.

 $^{^2}$ The BOP recently changed the term "Community Corrections Center" to "Residential Reentry Center." See Def.'s Mem. at 2 n.1.

Plaintiff filed the instant Complaint on June 10, 2008, seeking \$65,288.27 for her total unpaid medical expenses; \$505.53 for expenses incurred on January 16, 2005, \$736.64 for expenses incurred on July 12, 2005, and \$64,046.10 for expenses incurred between July 17 and August 8, 2005. Compl. ¶¶ 11, 16-17, 39. However, Defendant asserts that on February 7, 2006, Plaintiff received a discount of her outstanding medical bills through the Albany Medical Center Hospital Charity Care Program ("Charity Care Program"). Def.'s Mem. at 13; Dkt. 13, Ex. 1b.³ Defendant later asserted in its reply that Plaintiff's medical bills total \$6,809.96. Reply at 2 (Dkt. No. 17). In Plaintiff's response to Defendant's Motion, she asserts that her medical expenses were ultimately reduced to \$6,809.96. Pl.'s Mem. at 12 (Dkt. No. 15).

II. PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT/ DEFENDANT'S MOTION TO VACATE THE DEFAULT

A. Standard for vacating entry of default

The Federal Rules provide that "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." FED. R. CIV. P. 55(a). After the Clerk has entered default against a defendant, the plaintiff may apply for a default judgment under Federal Rule of Civil Procedure 55(b). However, it is well-settled in the Second Circuit that defaults are not favored, and that there is a strong preference for resolving disputes on the merits. See Pecarksy v. Galaxiworld.com Ltd., 249 F.3d 167, 174 (2d Cir. 2001).

"The court may set aside an entry of default for good cause[.]" FED. R. CIV. P. 55(c). Courts

³ While Defendant asserts in its memorandum that the Charity Care Program reduced Plaintiff's medical bills to \$6,500.71, the documentation produced by Defendant shows that the Charity Care Program reduced the amount to \$6,440.71. Def.'s Mem. at 13; Dkt. 13, Ex. 1b.

must assess three criteria in determining whether to set aside a default: "(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented." Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). Courts may also consider other equitable factors, including "whether the failure to follow a rule of procedure was a mistake made in good faith and whether the entry of default would bring about a harsh or unfair result." Id. "[W]hen doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party. In other words, 'good cause' . . . should be construed generously." Id.

B. Discussion

Plaintiff filed a request for entry of default on September 12, 2008. Dkt. No. 9. The Clerk entered default on that date. Dkt. No. 10. The United States contends that the entry of default against it was improper, as Plaintiff failed to comply with the service requirements of Rule 4 of the Federal Rules of Civil Procedure.

The Federal Rules provide that a party suing the United States must serve the summons and complaint upon both the United States Attorney General and the United States Attorney for the district where the case was brought. FED. R. CIV. P. 4(i)(1)(A), (B). The Federal Rules further provide that "if the action challenges an order of a nonparty agency or officer of the United States," the party must serve the summons and complaint upon that agency or officer. FED. R. CIV. P. 4(i)(1)(C).

Here, Plaintiff's Complaint challenges an order of a nonparty agency—the BOP. The Complaint states that "[t]he United States, through its agency (Bureau of Prisons), wrongfully and negligently breached" duties owed to the Plaintiff. Compl. ¶ 6. However, the summons and

complaint were served upon the United States Attorney for the Northern District of New York and the Attorney General, but not upon the BOP.

Given Plaintiff's failure to fully comply with the service requirement of Rule 4, the Clerk's entry of default was in error. In the alternative, the Court concludes that the Defendant has met the good cause standard required to vacate the entry of default. The Court fails to see how the Defendant's reliance upon the service requirements of the Federal Rules can be regarded as a willful failure to appear that would preclude vacating the default. Even if the Defendant's reading of Rule 4 had been in error, such reading would be the kind of good faith mistake that courts may consider when deciding a motion to vacate default.

There is also no indication that Plaintiff would suffer substantial prejudice within the meaning of Rule 55(c) if the Court grants Defendant's Motion. "[D]elay alone is not a sufficient basis for establishing prejudice." <u>Davis v. Musler</u>, 713 F.2d 907, 916 (2d Cir. 1983) (citation omitted). Rather, "[t]he plaintiff must demonstrate that the default caused some actual harm to its ability to litigate the case, such as by diminishing the amount of available evidence, or that it relied to his detriment on the judgment entered." <u>MacEwen Petroleum, Inc. v. Tarbell</u>, 173 F.R.D. 36, 40 (N.D.N.Y. 1997). Plaintiff has not made such a showing here.

Furthermore, the Court finds that Defendant has made a sufficient showing of a meritorious defense as to vacate the default. To vacate a default, a defendant "need not establish his defense conclusively . . . but he must present evidence of facts that, if proven at trial, would constitute a complete defense." S.E.C. v. McNulty, 137 F.3d 732, 740 (2d Cir. 1998) (internal quotation marks and citations omitted). As discussed below, Defendant has presented a meritorious defense to all of Plaintiff's claims. Accordingly, Defendant's Motion to vacate the entry of default is granted and the

Plaintiff's Motion for default judgment is denied.

III. DEFENDANT'S MOTION TO DISMISS/ MOTION FOR JUDGMENT ON THE PLEADINGS/ MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

As a preliminary matter, the Court must address the appropriate standard of review for Defendant's Motion to dismiss Plaintiff's claims. The United States moves for dismissal pursuant to Rule 12(b)(6), judgment on the pleadings pursuant to Rule 12(c), or in the alternative, for summary judgment pursuant to Rule 56. The United States has included exhibits in support of its Motion. See Dkt. No. 13. When considering a motion to dismiss a complaint for failure to state a claim, a court "may consider all papers and exhibits appended to the complaint, as well as any matters of which judicial notice may be taken." Hirsch v. Arthur Andersen and Co., 72 F.3d 1085, 1092 (2d Cir. 1995). The same standard applies to a motion for judgment on the pleadings. See Cleveland v. Caplaw Enterprises, 448 F.3d 518, 521 (2d Cir. 2006) (citation omitted); Life Products Clearing, LLC v. Angel, 530 F. Supp. 2d 646, 652 (S.D.N.Y. 2008). If a court considers materials other than those listed above, "the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); see Global Network Communications, Inc. v. City of New York, 458 F.3d 150, 154-56 (2d Cir. 2006).

The Federal Rules provide that a defendant may move "at any time" for summary judgment. FED. R. CIV. P. 56(b). "Pre-discovery summary judgment is the exception rather than the rule and will be granted only in the clearest of cases." Wells Fargo Bank Northwest, N.A. v. Taca Intern.

Airlines, S.A., 247 F. Supp. 2d 352, 360 (S.D.N.Y. 2002) (internal quotation and citations omitted). However, "where it is clear that the [non-moving party] cannot defeat the motion by showing facts